

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

RECEIVED

MAY 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

The Bell Operating Companies' Tariff)
for the 800 Service Management System)
Tariff FCC No. 1)

Transmittal No. 1

and)

800 Data Base Access Tariffs)

CC Docket No. 93-129

To: The Commission

APPLICATION FOR REVIEW OF GTE

GTE Service Corporation, on behalf of
its affiliated GTE Telephone Operating
Companies and GTE System
Telephone Companies

Of Counsel:

Alfred Winchell Whittaker
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5090

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

Ward W. Wueste, Jr., HQE03J43
Richard McKenna, HQE03J36
P.O. Box 152092
Irving, TX 75015-2092
(718) 214-6314

May 28, 1993

THEIR ATTORNEYS

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	iii
BACKGROUND	2
DISCUSSION	3
The Bureau's Rate Reduction Order Violates the Communications Act's Requirement for a Hearing and Findings.	4
The Bureau Exceeded Its Authority Under Section 204(a) "Partial Suspension" Provision.	6
Other Available Remedies Would Have Protected The Public Interest.	10
CONCLUSION	10

SUMMARY

The GTE Telephone Operating Companies hereby seek Commission review of the Common Carrier Bureau's April 28, 1993 800 Data Base Tariff Order which partially suspended the GTOCs' 800 data base query rates and directed the GTOCs to file new rates reflecting the partial suspension.

The Bureau's directive that the GTOCs implement the Bureau-directed rates should be set aside on review by this Commission because:

- (1) the Bureau-ordered reduction in the GTOCs' rates effectively prescribed a rate without giving the GTOCs a "full opportunity for hearing," as required by Section 205; and
- (2) the Bureau exceeded its "partial suspension" authority under Section 204(a) when it forced the GTOCs to provide service at rates below the GTOCs' costs and failed to provide the opportunity for comment that such partial authorization is "just, fair, and reasonable" as required by Section 204(b).

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

RECEIVED
MAY 28 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
The Bell Operating Companies' Tariff)	
for the 800 Service Management System)	
Tariff FCC No. 1)	Transmittal No. 1
)	
and)	
)	
800 Data Base Access Tariffs)	CC Docket No. 93-129

To: The Commission

APPLICATION FOR REVIEW OF GTE

GTE Service Corporation, on behalf of its affiliated domestic GTE Telephone Operating Companies ("the GTOCs") and the GTE System Telephone Companies ("the GSTCs") (collectively, "the GTOCs" or "GTE"), respectfully requests that the Commission review those parts of the Common Carrier Bureau 800 Data Base Tariff Order¹ which, after suspending the GTOCs' 800 data base rates for the full statutory period and instituting an investigation of those rates, ordered the GTOCs to file, on one day's notice, new rates "reflecting the partial suspension of their basic 800 data base query rates." In support of this Application for Review, the following is shown:

¹ In the Matter of 800 Data Base Access Tariffs, DA 93-491 (Com. Car. Bur., released, Apr. 28, 1993) ("800 Data Base Tariff Order").

BACKGROUND

The Commission recently directed all Local Exchange Carriers ("LECs"), including the GTOCs, to file access tariffs to implement "800 data base service," thus allowing portability of "800" numbers for the first time. The Commission prescribed a rate structure and filing dates for 800 data base access tariffs.² As required, the GTOCs filed their 800 data base access tariffs on March 1, 1993 to become effective May 1, 1993. GTE filed cost and other support justifying the level of the access charges set out in the tariffs.

Ignoring that evidence, the Bureau "performed a statistical analysis" and, based solely on that analysis, concluded that any rates that "exceeded the industry mean rate plus one standard deviation" were presumptively unreasonable. 800 Data Base Tariff Order at ¶19. The GTOCs' rates exceeded that threshold.

Rather than suspend the GTOCs' tariffs for one day and allow them to go into effect subject to investigation and an accounting order, the Commission ordered (under the guise of a "partial suspension") the GTOCs to roll back their rates to the presumed reasonable level pending investigation and put those rates under an accounting order. 800 Data Base Tariff Order at ¶19. The Bureau then gave the GTOCs one day to file the Bureau-ordered rates, 800

² Provision of Access for 800 Service, Notice of Proposed Rulemaking, 102 F.C.C. 2d 1387 (1986); Supplemental Notice of Proposed Rulemaking, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991); Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907 (1993) (Rate Structure Order); Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1423 (1993); Order, DA 93-294 (March 11, 1993).

Data Base Tariff Order at ¶132, and directed that those rates be filed on one day's notice. 800 Data Base Tariff Order at ¶124.

GTE filed an Emergency Motion for Stay of the Bureau Order with the Commission on April 29, 1993. No action has been taken on that Motion by the Commission. On April 30, GTE filed a Petition for Review³ and Emergency Motion for Stay with the U.S. Court of Appeals for the District of Columbia Circuit. That Motion was ultimately denied by the Court.⁴ GTE subsequently withdrew its Petition in order to seek Application for Review with this Commission.

DISCUSSION

There are two reason why the Bureau's directive that the GTOCs implement the Bureau-directed rates should be set aside on review by this Commission: (1) the Bureau-ordered reduction in the GTOCs' rates effectively prescribed a rate without giving the GTOCs a "full opportunity for hearing," as required by Section 205; and (2) the Bureau exceeded its "partial suspension" authority under Section 204(a) when it forced the GTOCs to provide service at rates below the GTOCs' costs and failed to provide the opportunity for comment that such partial authorization is "just, fair, and reasonable" as required by Section 204(b).

³ GTE Southwest Incorporated et al. v. F.C.C., Cas. No. 93-1290 (D.C. Cir. filed Apr. 30, 1993).

⁴ Order, Cas No. 93-1290 (D.C. Cir. May 5, 1993).

The Bureau's Rate Reduction Order Violates the Communications Act's Requirement for a Hearing and Findings.

When carriers file tariffs, the FCC has two options. Section 204(a)(1) allows the FCC to suspend the tariff's effective date for up to five months while the FCC investigates the proposed rates. If the FCC has not finished its investigation at the end of the suspension period, the rates go into effect by operation of law. At that time, the Commission may impose an accounting order to cover possible refunds. The FCC's other option is to allow the tariff to take effect on schedule without suspension. Here the Bureau went beyond either of those two options, and instead ordered the GTOCs to file a lower rate.⁵ The Bureau may not do that under the guise of a suspension order.

The Communications Act is very explicit that the Commission may order an adjustment to a carrier-initiated rate only after giving the carrier a "full opportunity for a hearing" and a finding based on the evidence that the carrier-initiated rate is unreasonable. 47 U.S.C. §205. Thus, regardless of the Commission's authority to partially suspend a rate filing, Section 204(a) does not give the Commission authority to order a carrier to implement a lower rate without the requisite hearing and findings based on record evidence:

To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the statutory hearing and finding requirements on the basis of its claimed broad and inherent regulatory power, would defeat

⁵ The GTOCs originally filed a basic rate of 1 cent per query. The Bureau suspended for five months the "amount of the basic 800 data base query rate that exceeds .67 [sic] cents per query" for the GTOCs and GSTCs. 800 Data Base Tariff Order at ¶32. The GTOCs and GSTCs were ordered to "file tariff revisions reflecting the partial suspension of their basic 800 data base query rates on April 29, 1993." *Id.* at ¶32.

the purpose of Section 205 and vitiate the specific statutory scheme.⁶

The Bureau's Order lacks the requisite findings to support the reasonableness of the interim rates mandated by the Order.

Moreover, the Order did not consider the pertinent record evidence provided in the GTOCs' cost study submitted with the tariff filing. This material showed the GTOCs' cost and demand characteristics. The Bureau's Order does not directly dispute the GTOCs' support other than finding that the GTOCs' rates are higher than those of the seven Regional Bell Operating Companies ("RBOCs"). Instead, the Bureau relied upon a statistical analysis to support its mandated rate. A statistical analysis and mean rate, however, cannot be used as a substitute for an investigation.

The Bureau conceded that its statistical analysis is "not exactly precise." 800 Data Base Order at ¶ 19. Nonetheless, the Bureau attempts to justify its use since "all LECs are deploying similar data base systems." *Id.* While the systems may be similar, the carrier's cost and demand -- those elements which make up the rate -- may be very different for each carrier. The Bureau's statistical analysis fails to take into account the evidence of the legitimate differences which could justify the difference in the rates. For example, the GTOCs' demand is significantly lower than the RBOCs' demand.⁷ Since the 800 database cost is substantially a fixed cost, this lower demand results in a higher rate. Furthermore, part of the GTOCs' rate includes costs not included in the

⁶ AT&T v. FCC, 487 F.2d 865, 8774-75 (2d Cir. 1973); see also Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975) ("The essential elements of a valid prescription order are a full opportunity to be heard and a finding that the action taken is just and reasonable.")

⁷ The GTOCs' query/access line is 95 while the RBOC average is 145. See Ad Hoc Petition to Reject Attachment C.

RBOCs' filings. The GTOCs' have software licensing right to use fees apparently not incurred by all the RBOCs. Also, the GTOCs' rate included costs which were offset by a reduction in the end office switching rate element.⁸ Thus, not only was the Bureau's rate reduction order lacking any evidentiary support, it was directly contrary to the relevant record evidence.

Regardless of the Commission's authority to partially suspend a rate filing, as discussed infra, the Commission does not have the authority to affirmatively order a carrier to implement a lower rate without the requisite hearing and findings based on record evidence. Thus, the Commission should overturn the Bureau's Order because it failed to provide the GTOCs the required hearing before determining the GTOCs' interim 800 data base query rate.

The Bureau Exceeded Its Authority Under Section 204(a) "Partial Suspension" Provision.

The Bureau's Order relies upon its authority to order a partial suspension under Section 204(a) in suspending that part of the GTOCs' rate above the rate determined by its statistical analysis. Section 204(a) provides that the Commission may "suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect." 47 U.S.C. §202(a). The "partial suspension" provision, however, does not authorize the Commission to order interim rate reductions during the suspension period. This lack of authority is clear from Section 204 and the legislative history of this section. Even if a partial suspension were permissible, the Bureau erred in failing to follow the necessary procedures set forth in Section 204(b) to give the

affected parties an opportunity for comment that such partial suspension is "just, fair, and reasonable."

Section 204(a) allows, as is clear from its legislative history, the Commission to permit a portion of a rate increase to go into effect while the remainder of the increase is suspended. The partial suspension provision does not authorize the Commission to order interim rate reductions during the suspension period.

Prior to 1976, Section 204 provided the Commission with authority to suspend a carrier tariff filing for up to three months, and to issue an accounting order if the suspended tariff involved a rate increase. However, this provision by its terms involved an "all or nothing" approach; the Commission could only suspend a proposed tariff in its entirety.⁹

To remedy that, the Commission recommended the partial suspension language [now Section 204(a)(1)] to Congress. In a letter to Congress endorsing the bill, Commission Chairman Wiley explained that the basic purpose was to mitigate the effects of regulatory lag on carrier-initiated tariff changes to and rate increases for existing services:

Section 204 does not now specifically authorize the Commission to separate questionable items from legitimate aspects of a tariff filing and thus does not permit the Commission to suspend the former and implement a temporary tariff change. Because legitimate changes may await completion of the hearing on questionable elements of a tariff, an unnecessary regulatory lag may be created.

The Administrative Conference of the United States recommended that regulatory agencies seek statutory

⁹ See MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 334 (D.C. Cir. 1980).

authority to allow temporary or partial rate increases in order to solve this problem. The amendatory language proposed by the Commission is designed to implement this recommendation. It authorizes the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing.¹⁰

Congress adopted this rationale. The House Report endorsed the legislation for precisely the reasons advanced by the Commission:

As discussed below, HR 13961 would authorize the Commission to conduct a preliminary written proceeding on a tariff filing and based thereon to grant partial or temporary tariff changes pending full hearing on the lawfulness of the filing.

. . .

In the Committee's judgment, the new authority to approve temporary or partial tariff changes will provide the Commission with the flexibility needed to mitigate the unnecessary effects of regulatory delay which presently attend the hearing and suspension process.¹¹

Nowhere in this legislative history did the Commission request, nor did the Congress intend to give, authority for the Commission to prescribe interim rates for new services at a level less than the rate filed by the carrier. While the House Report discusses the need to allow portions of rate changes, there is no discussion on the need for the Commission to have the power to set entirely new rates for new (or restructured) services on an interim basis. Instead, as discussed in the previous section, the Commission's only power to set a new

¹⁰ House Report No. 94-1315 (June 30, 1976), reprinted in 1976 US Code Cong. & Ad. News 1926, 1933 (emphasis added).

¹¹ House Report No. 94-1315 at 1927, 1929-30 (emphasis added).

rate is under Section 205, and the Bureau's Order does not purport to use that section.

Even if this were a permissible partial suspension under Section 204(a), the Bureau's Order is deficient for its failure to follow the procedures required for a partial suspension under Section 204(b). Section 204(b) provides that if the Commission is going to allow a portion of rate filings to go into effect, it must first give the carriers and other interested parties the opportunity to address whether the partial authorization is "just, fair, and reasonable."¹² The Bureau, however, ignored the requirements of Section 204(b). The Bureau did not give the GTOCs or any party an opportunity to address whether the Bureau ordered interim rates are just, fair and reasonable. In fact, the GTOCs were not aware that they were to be required to file interim rates until the 800 Access Tariff Order was released.

Thus, the Bureau's exceeded its authority by allowing only a percentage of the rate to go into effect. Even if the partial suspension was proper, the Bureau failed to follow the required procedures to give the affected parties an opportunity to comment. Either of these actions requires that the Commission reverse the Bureau's Order.

¹² The Commission has understood and interpreted Section 204 to require precisely that. See, e.g., AT&T-Exchange Network Facilities, 93 F.C.C. 2d 739, 761 n.59 (1983). "Temporary partial authorizations of tariff rates under Section 204(b) require a prior 'written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable.' 47 U.S.C. §204(a)."

Other Available Remedies Would Have Protected The Public Interest.

Section 204(a) provides the Commission with the mechanism to allow the carrier's rate to go into effect as filed under an accounting order while the Commission continues its investigation into the lawfulness of the rate. This statutory remedy provides protection for both customers and the carrier. The 800 Data Base Tariff Order imposed such an accounting order on the LECs and allowed the BOCs to implement their filed rates. The Bureau erred by failing to allow the GTOCs' filed rate to take effect subject to an accounting order.

Once an accounting order is imposed the Commission could require GTE to refund, with interest, at the conclusion of the investigation any amounts collected over the established lawful rate. Under this procedure, customers are fully protected by later refunds of unlawful amounts.¹³ Moreover, GTE would be protected should it later be able to justify the filed rate. Otherwise, GTE would never be able to collect the revenue from the partially suspended rate from the users of the service. GTE seeks from this Commission a determination, that as a matter of policy, the Bureau should have relied on the statutory accounting order and refund mechanism and allowed GTE's filed rate to take effect.

CONCLUSION

The Bureau-ordered reduction in the GTOCs' rates effectively prescribed a rate without giving the GTOCs a "full opportunity for hearing," as required by Section 205. In addition, the Bureau exceeded its "partial suspension" authority under Section 204(a) when it forced the GTOCs to provide service at rates below

¹³ Since the customers of the 800 data base queries are all interexchange carriers, such as AT&T and MCI, it could hardly be a hardship for them to pay the entire 1 cent rate when the service is provided.

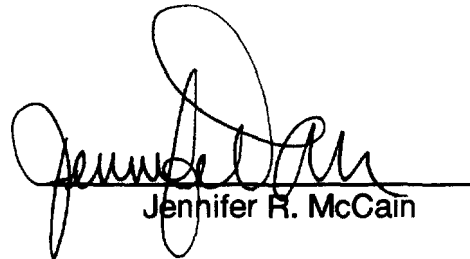
the GTOCs' costs and failed to provide the opportunity for comment that such partial authorization is "just, fair, and reasonable" as required by Section 204(b). For these reasons, the Bureau's Order requiring the GTOCs to implement the Bureau-directed rates should be set aside on review by this Commission.

Respectfully submitted,

GTE Service Corporation on behalf of

Certificate of Service

I, Jennifer R. McCain, hereby certify that copies of the foregoing "Application for Review of GTE" have been mailed by first class United States mail, postage prepaid, on the 28th day of May, 1993 to all parties on the attached list.



Jennifer R. McCain

John L. Bartlett
Attorney
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Francine J. Berry
Attorney
American Telephone
and Telegraph Company
295 North Maple Ave.,
Room 3244J1
Baskin Ridge, NJ 07920

William A. Blase, Jr.
Director-Federal Regulatory
Southwestern Bell
1667 K Street, NW
Suite 1000
Washington, DC 20006

James S. Blaszak
Attorney
Gardner, Carlton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, DC 20005

R. W. Fleming
Attorney
BellSouth Services
29G57 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

Jacob J. Goldberg
Executive Director
NYNEX Telephone Companies
Federal Regulatory Matters
1828 L Street, NW
Suite 100
Washington, DC 20036

John M. Goodman
Attorney
Bell Atlantic Telephone Companies
1710 H Street, N.W.
Washington, DC 20006

David A. Gross
Attorney
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2404

Carolyn C. Hill
Attorney
ALLTEL Service Corporation
1710 Rhode Island Avenue, NW
Suite 1000
Washington, DC 20036

Rochelle D. Jones
Director-Regulatory
Southern New England Telephone Company
227 Church Street
Fourth Floor
New Haven, CT 06510-1806

Floyd S. Keene
Attorney
Ameritech Operating Companies
2000 West Ameritech Center Drive
4H84
Hoffman Estates, IL 60196-1025

Jay C. Keithley
Vice President, Lay/External Affairs
United Telecommunications, Inc.
1850 M Street, NW
Suite 1110
Washington, DC 20036

Henry D. Levine
Attorney
Levine, Lagapa & Block
1200 19th Street, NW
Suite 602
Washington, DC 20036

Kathleen Levitz
Acting Chief
Federal Communications Commission
Common Carrier Bureau
1919 M Street, NW
Washington, DC 20554

Joseph P. Markoski
Attorney
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, NW
P.O. Box 407
Washington, DC 20044-0407

Randolph J. May
Attorney
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2404

Brian R. Moir
Attorney
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W.
Suite 800
Washington, DC 20037-1170

Norina T. Moy
Sprint Communications Company LP
1850 M Street, NW
Suite 1110
Washington, DC 20036

Carol R. Schultz
Attorney
MCI Telecommunications Corporation
Technical Regulatory Affairs
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Janis A. Stahlhut
US West, Inc.
1020 19th Street, NW
Suite 700
Washington, DC 20036

A. E. Swan
Executive
Pacific Bell
140 New Montgomery Street
San Francisco, CA 94105

Gregory J. Vogt
Chief
Federal Communications Commission
Common Carrier Bureau, Tariff Division
1919 M Street, N.W.
Room 518
Washington, DC 20554

William T. Wardwell
Vice President
Sprint/United Management Company
Local Telecommunications Division
P.O. Box 11315
Kansas City, MO 64112